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IN THE

Supreme Court of the United States

October Term, 1969
No. 726

CHARLENE MITCHELL, *et al.*,

Appellants,

vs.

JOSEPH L. DONOVAN, Secretary of State of the State of Minnesota, and DOUGLAS M. HEAD, Attorney General of the State of Minnesota,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM THE JUDGMENT ENTERED BELOW

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Appellants,

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JOSEPH L. DONOVAN, Secretary of State of the State of Minnesota, and DOUGLAS M. HEAD, Attorney General of the State of Minnesota,

Appellees.

MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM THE JUDGMENT ENTERED BELOW

Come now appellees, Joseph L. Donovan, Secretary of State of the State of Minnesota, and Douglas M. Head, Attorney General of the State of Minnesota, pursuant to U.S. Sup. Ct. Rule 19, 28 U.S.C., by counsel, and for the reasons stated and upon the authority contained in the attached and incorporated brief in support hereof, move this Court to dismiss the above-captioned appeal or, in the alternative, to affirm the judgment entered below.

As ground whereof appellees aver and allege the following:

1) The three-judge District Court, convened pursuant to 28 U.S.C. §§ 2282 and 2284, to determine the issues below, based its jurisdiction over the subject matter upon 28 U.S.C. § 1331, Subject matter jurisdiction under 28 U.S.C. § 1331 is lacking as there is nothing in the original or amended complaint of appellants to indicate, or from which it may be inferred, that the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs as is required by that statute. Subject matter jurisdiction is lacking under 28 U.S.C. § 1343(3), and 42 U.S.C. § 1983, as appellees at no time acted under color of state law.

2) The three-judge District Court was convened pursuant to 28 U.S.C. § 2282. Such was an improper basis upon which to convene the panel in that the relief requested by appellants in their original and amended complaints did not call for the restraint of the operation, enforcement, or execution of an Act of Congress on the basis of its constitutional repugnancy. As a consequence, a direct appeal to this Court from the judgment entered below is not allowed by 28 U.S.C. § 1253.

3) A direct appeal to this Court pursuant to 28 U.S.C. § 1253 is not permissible, because the order dismissing the complaint could and did refer only to the prayer for declaratory relief, the prayer for injunctive relief having been rendered moot by the general election of November 5, 1968.

4) The judgment below, dismissing the prayer for declaratory relief for mootness and for lack of an actual justiciable controversy, manifests a proper exercise of judicial discretion given the facts and circumstances presented to the three-judge District Court.

5) The three-judge District Court did not pass upon the claimed constitutional infirmities alleged to exist with respect to the Communist Control Act of 1954, 50 U.S.C. §§ 841 and 842. As such, this Court should refuse to hear this appeal to determine the soundness of appellant's constitutional claims, for to do so in this context would require an impermissible advisory opinion.

Respectfully submitted,

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CHARLENE MITCHELL, *et al.*,

Appellants,

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JOSEPH L. DONOVAN, Secretary of State of the State of Minnesota, and DOUGLAS M. HEAD, Attorney General of the State of Minnesota,

Appellees.

BRIEF IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM THE JUDGMENT ENTERED BELOW

Pursuant to U.S. Sup. Ct. Rule 19, 28 U.S.C., the appellees, Joseph L. Donovan, Secretary of State of the State of Minnesota, and Douglas M. Head, Attorney General of the State of Minnesota, submit this brief in support of the attached and incorporated "Motion to Dismiss, or in the Alternative, to Affirm the Judgment Entered Below" which judgment was entered by a three-judge District Court dismissing the above-captioned complaint as moot.

OPINIONS BELOW

An initial opinion, dated October 2, 1968, which granted a requested Order requiring appellee, Joseph L. Donovan, to place the names of appellant presidential and vice-presidential candidates on the November 1968 Minnesota general election ballot is reported at 290 F. Supp. 642 (D. Minn. 1968), and is accurately set forth at pp. 25-37 of the Appendix to Appellants' Jurisdictional Statement. The opinion from which this appeal arises, also set forth accurately at pp. 38-47 of the Appendix to Appellants' Jurisdictional Statement, is reported at 300 F. Supp. 1145 (D. Minn. 1969).

JURISDICTION

Appellants initiated this action in the United States District Court for the District of Minnesota for a temporary and permanent injunction requiring the Minnesota Secretary of State to accept nominating petitions of appellants and to place the names of appellants Mitchell and Zagarell on the November 1968 Minnesota general election ballot; and for a declaratory judgment that the Communist Control Act of 1954, 50 U.S.C. §§ 841 and 842, is unconstitutional and void.

The action was commenced under 28 U.S.C. § 1331; 28 U.S.C. 1343 (3) and (4); 42 U.S.C. §§ 1981, 1983, and 1988; and 28 U.S.C. §§ 2282 and 2284.

Arguments were heard on September 17, 1968, by the Honorable Edward J. Devitt, Chief Judge of the District Court, relating to subject matter jurisdiction and the necessity of convening a statutory three-judge Court. Probable jurisdiction was noted pursuant to 28 U.S.C. §§ 1331 and 1343, and a three-judge District Court was ordered convened under the provisions of 28 U.S.C. §§ 2282 and 2284. The three-judge

Court granted a temporary injunction on October 2, 1968 which directed appellee Donovan to accept the appellants' nominating petition and to place their names on the November 5, 1968 general election ballot. *Mitchell v. Donovan*, 290 F. Supp. 642, 646 (D. Minn. 1968). The Court's order was complied with in all respects. *Mitchell v. Donovan*, 300 F. Supp. 1145, 1146 (D. Minn. 1969).

Prior to the general election (on October 10, 1968), appellants moved to amend their complaint by adding the allegations that the Communist Party plans to participate in Minnesota local, state and national elections held subsequent to November 5, 1968, and that

> ". . . upon 'information and belief,' it appears that Attorney General Head will continue to advise Minnesota election officials that the Communist Control Act of 1954, 50 U.S.C.A. §§ 841, 842 bars the Communist Party or any candidates running under its express endorsement from participating in any and all Minnesota elections."

Mitchell v. Donovan, 300 F. Supp. 1145, 1147.

One week subsequent to November 5, 1968, appellees moved to dismiss the complaint on the basis that the issues involved in the litigation had become moot and that there no longer existed justiciable issues. The motion to amend the complaint was granted, *Id.* p. 1147, as was the motion to dismiss. *Id.* At no time did the three-judge District Court pass upon the merits of appellants' constitutional claims with respect to 50 U.S.C. §§ 841 and 842. Therefore, the final order of the three-judge District Court, which dismissed the prayer for declaratory relief on the grounds of mootness and lack of an actual justiciable controversy, and which did not interdict the operation, enforcement or execution of the federal statute on the

basis of its constitutional repugnancy, is not appealable directly to this Court pursuant to 28 U.S.C. § 1253.

STATUTES INVOLVED

In addition to 50 U.S.C. §§ 841 and 842 set forth by appellants at pp. 3-5 of the Jurisdictional Statement, the following federal statutes are involved: 28 U.S.C. §§ 1331; 1343 (3) and (4); 2282; 1253; and 2201; and 42 U.S.C. § 1983.

28 U.S.C. § 1331 provides in relevant part:

"§ 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

* * *"

28 U.S.C. § 1343 provides, in relevant part:

"§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for

the protection of civil rights, including the right to vote."

28 U.S.C. § 2282 provides:

"§ 2282. Injunction against enforcement of federal statute; three-judge Court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

28 U.S.C. §1253 provides:

"§ 1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

28 U.S.C. § 2201 provides:

§ 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such decla-

ration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

42 U.S.C. § 1983 provides:

"§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

QUESTIONS PRESENTED

Appellees consider that the question raised by this appeal may be more properly framed as follows:

1) Whether the three-judge District Court, convened pursuant to 28 U.S.C. §§ 2282 and 2284, lacked jurisdiction over the subject matter of the controversy under 28 U.S.C. § 1331, 28 U.S.C. § 1343(3), or 42 U.S.C. § 1983.

2) Whether the three-judge District Court was improperly convened pursuant to 28 U.S.C. §§ 2282 and 2284, as the relief requested did not require restraining the enforcement, operation or execution of an Act of Congress for repugnance to the Constitution of the United States.

3) Whether a direct appeal to this Court is permissible pursuant to 28 U.S.C. § 1253, in that the dismissal of the complaint refers only to the prayer for declaratory relief, the prayer for injunctive relief having been rendered moot by the general election.

4) Whether, if the three-judge District Court possessed the requisite subject matter jurisdiction, it properly dismissed the prayer for declaratory relief on the grounds that the questions presented were moot, and that there did not exist an actual justiciable controversy.

5) Whether, because the three-judge District Court did not pass upon the claimed constitutional repugnancy of 50 U.S.C. §§ 841 and 842, it would require an impermissible advisory opinion by this Court, given the context of this case, for the constitutional challenges to be decided at this time.

STATEMENT OF THE CASE

Appellees accept, with two reservations, appellants' "Statement of the Case." With respect to the observations and position of the United States Attorney for the District of Minnesota as such were purportedly found by the three-judge District Court, this Court's attention is directed, respectfully, to *Mitchell v. Donovan*, 290 F. Supp. 642, 644-645. Further, it is alleged at p. 8 of appellants' Jurisdictional Statement that:

> "The written opinion of the State Attorney General stated that the Communist Control Act of 1954, 50 U.S.C. §§ 841 and 842, bars the Secretary of State from accepting and filing the nominating petition submitted by the Communist Party of Minnesota and the Communist Party, U.S.A. (Affidavit of Lynn S. Castner, September 11, 1968)."

The memorandum of Attorney General Head to Secretary Donovan in question, dated September 9, 1968, states, in its entirety, as follows; and it speaks for itself:

> "You have requested our opinion as to whether you should accept for filing a nominating petition for presi-

dential electors submitted pursuant to M.S. 1967 § 202.10 on behalf of the Communist Party of the United States.

"Your attention is directed to The Communist Control Act, 50 U.S.C. § 841 (1964) which provides, in part, as follows:

'The Congress finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the government of the United States. . . . Therefore, the Communist Party should be outlawed.'

"Section 842 of the Communist Control Act declares that:

'The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the government of the United States, or the government of any state, territory, district, or possession thereof, or the government of any political subdivision therein, by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivisions thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are terminated. . . .'

"In view of the above federal statutes, we are of the opinion that you should refuse to accept for filing the nominating petition in question. However, any doubts

relative to this matter can only be finally resolved by the courts pursuant to appropriate legal proceedings."

The above memorandum was submitted to appellee Donovan pursuant to his informal, oral request. The memorandum was never intended to be, nor has it ever become, a formally published Opinion of the Attorney General.

ARGUMENT

I

The three-judge District Court convened pursuant to 28 U.S.C. §§ 2282 and 2284, lacked jurisdiction over the subject matter of the controversy under 28 U.S.C. § 1331; 28 U.S.C. § 1343(3); or 42 U.S.C. § 1983.

Although probable jurisdiction was noted by the one-judge court by invoking 28 U.S.C. §§ 1331 and 1343, it is obvious that the three-judge Court granted its temporary injunction on October 2, 1968, on the jurisdictional basis of 28 U.S.C. § 1331, alone. The court in its opinion discussed the Communist Control Act of 1954, the possible conflict of the Act with various provisions of the United States Constitution, and the impropriety of passing upon the constitutionality of the federal statute in the short length of time which was available to allow the court's mandate to become effective before the general election. The court therefore treated the controversy as one arising under the Constitution or laws of the United States. 28 U.S.C., § 1331. Lacking from the court's opinion is any discussion to the effect that the civil rights of appellants were being violated by the appellees acting under the color of state laws. Further, it is clear from the concurring

opinion of District Judge Neville that the court was acting only pursuant to 28 U.S.C., § 1331. At page 646 of 290 F. Supp., he states:

> "I would prefer to bottom jurisdiction on 42 U.S.C. § 1983 (Civil Rights Act) and 28 U.S.C. § 1343 rather than on 28 U.S.C. § 1331."

Subject matter jurisdiction is lacking, however, under 28 U.S.C. § 1331, as there is nothing in the complaint of appellants, either as originally filed or as amended, to indicate that the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, as is required by that statute. Jurisdiction is to be, and must be, determined from the allegations of the complaint. *Mosher v. City of Phoenix*, 287 U.S. 29 (1932); *Levering and Garrigues Co. v. Morrin*, 289 U.S. 103 (1933); *McNutt v. General Motors Acceptance Corporation*, 298 U.S. 178 (1936).

The appellants throughout this proceeding have taken the position that in a voting rights case, the court may presume that the matter in controversy exceeds the sum or value of $10,000.00, and they cite: *Wiley v. Sinkler*, 179 U.S. 58 (1900); *Swafford v. Templeton*, 185 U.S. 487 (1902); and *Giles v. Harris*, 189 U.S. 475 (1903). The appellants then attempt to buttress their position by using *Howard v. Ladner*, 116 F. Supp. 783 (S.D. Miss. 1953), *re'vd. per curiam, White et al. v. Howard et al.*, 347 U.S. 910 (1954); and *Hague v. C.I.O.*, 307 U.S. 496 (1939), (Concurring opinion of Mr. Justice Stone).

An examination of the case relied upon by appellants, and other recent cases, shows that the court does not and may not presume the requisite jurisdictional amount to be present in voting rights cases under 28 U.S.C. § 1331.

Both *Wiley v. Sinkler, supra,* and *Swafford v. Templeton, supra,* were voting rights cases. But the distinguishing element in both is that plaintiff in each case sued for damages, alleging the jurisdictional requisite under the predecessor of 28 U.S.C. § 1331. The plaintiff in each case alleged that he had been damaged to the stated amount by certain acts of defendant, who, it was claimed, wrongfully rejected his vote. In neither case did the court state that the jurisdictional amount may be presumed in a voting rights case.

The majority opinion in *Giles v. Harris, supra,* is somewhat more difficult to reconcile. That case involved a complaint in equity that defendant be required to enroll the name of plaintiff and others on certain voting lists. Plaintiff argued that jurisdiction be premised on the then Civil Rights Act. Plaintiff, however, did not allege damages and the Circuit Court on its own motion felt the bill was deficient in this respect. This court stated:

> "We have recognized too, that the deprivation of a man's political and social rights properly may be alleged to involve damage to that amount, capable of estimation in money. (Citing *Wiley* and *Swafford.)* But, assuming that the allegation should have been made in a case like this, the objection to its omission was not raised in the Circuit Court, and as it could have been remedied by amendment, we think it unavailing."

189 U.S. 475, 485.

The court, therefore, decided to find jurisdiction present on the basis that no claim had been made below that it was not. The majority opinion prompted three dissents, Mr. Justice Harlan calling the jurisdictional conclusion "a new, and I take leave to say, a startling, doctrine." *Id.* 189 U.S. 475, 498.

Subsequent case law has all but ignored the majority's position in *Giles*.

In the briefs and arguments below, appellants placed strong emphasis upon the concurring opinion of Mr. Justice Stone in *Hague v. C.I.O., supra.* Plaintiffs in that case were various labor groups attempting to secure rights under the newly passed National Labor Relations Act. They were trying to enjoin municipal officers from enforcing ordinances which forbade the distribution of printed matter and the holding of public meetings without permits. Plaintiffs alleged that jurisdiction existed under both the Civil Rights Act and the predecessor of 28 U.S.C. § 1331. This Court held there was original jurisdiction only under the Civil Rights Act. In regard to the predecessor of 28 U.S.C. § 1331, the court stated that a mere allegation of damages was an insufficient basis upon which to predicate jurisdiction.

> "In suits brought under (the predecessor of 28 U.S.C., § 1331) a traverse of the allegation as to the amount in controversy, or a motion to dismiss based upon the absence of such amount, calls for substantial proof of the plaintiff of facts justifying the conclusion that the suit involved the necessary sum. The record here is bare of any showing of the value of the asserted rights to the respondent individually . . . ."

307 U.S. 496, 507-508.

Mr. Justice Stone, concurring, felt that the final disposition of the case was correct, but felt that jurisdiction was also present under the predecessor of 28 U.S.C., § 1331. He stated:

> "There are many rights and immunities secured by the Constitution, of which freedom of speech and assembly are conspicuous examples, which are not capable of money

> valuation, and in many instances, like the present, no suit in equity could be maintained for their protection if proof of the jurisdictional amount were prerequisite."

307 U.S. 496, 529.

With respect to 28 U.S.C., § 1331, then, Mr. Justice Stone's concurrence in *Hague* is actually a dissent, and cannot be relied upon to the extent appellants have urged.

The fact that the requisite jurisdictional amount may not be presumed to exist under 28 U.S.C. § 1331, either in voting rights cases or any case involving social rights or personal liberties, can be seen from a number of cases decided subsequent to *Hague.*

In *Howard v. Ladner*, 116 F. Supp. 783 (S.D. Miss. 1953), plaintiffs were officers and members of the "Republican Party of Mississippi" and defendants were the Secretary of State and others who were members and officers of the "Mississippi Republican Party." Plaintiffs sought to restrain defendants from enforcing a state statute that provided that no other political party could use or register a name already registered, which the defendants had done. Although there was some discussion about original jurisdiction under the Civil Rights Act, jurisdiction was premised solely on 28 U.S.C. § 1331. The District Court held that jurisdiction was present, stating that for jurisdictional purposes, the value of social and political rights is capable of pecuniary valuation. This Court, however, reversed per curiam, *White et al. v. Howard et al., supra,* and denied a rehearing. The complaint was ordered dismissed on jurisdictional grounds. From this series of events, it can be seen that if a deprivation of social and political rights is litigated, pursuant to 28 U.S.C. § 1331, plaintiff has the burden to both allege and prove the value of the deprivation in pecuniary terms.

Giancana v. Johnson, 335 F. 2d 366 (7th Cir. 1964), is similar. Plaintiff argued that personal rights and liberties cannot be given a price tag, and that the jurisdictional requisite may be presumed to exist in such a case. Plaintiff alleged various infringements of personal liberties growing out of a constant surveillance of himself and his home by FBI agents. In vacating the judgment of the District Court, the Circuit Court of Appeals held there was no original jurisdiction.

> "Courts may not treat as a mere technicality the jurisdictional amount essential to the 'federal question' jurisdiction, even in this case where there is an allegedly unwarranted invasion of plaintiff's privacy. The showing of that essential is not a mere matter of form, but is a necessary element. Congress in § 1331 expressed the 'federal question' jurisdiction in plain words. The district courts and suitors are bound by the words expressed.
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> * * *
>
> "Here the complaint makes no express allegation of the essential jurisdictional sum or value. . . . If, as plaintiff contends, the sum or value cannot be alleged because of the priceless rights involved, how can this court infer that essential element?
>
> * * *
>
> "Congress had a reason for setting the minimum jurisdictional sum or value in limiting the jurisdiction of the district court. (It surely knew of the priceless nature of liberty and privacy when it required a showing of that element.)"

335 F. 2d 366, 368-369.

This Court denied certiorari. 379 U.S. 1001 (1965).

In *Van Buskirk v. Wilkinson*, 216 F. 2d 735 (9th Cir. 1954), plaintiff, a federal prisoner, petitioned the district court for an injunction restraining defendant, warden of the penitentiary, from enforcing 18 U.S.C. § 4164, which provides for conditional release of prisoners, and for a judgment declaring that Act void for repugnance to the Constitution. The court dismissed the complaint due to lack of federal jurisdiction and suggested that plaintiff's remedy was a petition for a writ of habeas corpus.

> "Appellant's petition in the District Court does not contain any allegation whatsoever of any amount in controversy. The omission is fatal if the petition is to be taken for what it purports to be, namely, an application for injunction and declaratory relief in a civil action arising under the Constitution and laws of the United States."

216 F. 2d 735, 737.

Finally, there is *Boyd v. Clark*, 287 F. Supp. 561 (S.D. N.Y. 1968). In that case, also involving an application for an injunction and a declaratory judgment, plaintiffs challenged the constitutionality of the student deferment system under the Selective Service Act, on the grounds that the Act discriminated against persons economically unable to attend college. Plaintiffs argued jurisdiction was present under 28 U.S.C. § 1331. The court found a lack of jurisdiction, stating:

> "It is firmly settled law that cases involving rights not capable of valuation in money may not be heard in federal courts where the applicable jurisdictional statute requires that the matter in controversy exceed a certain number of dollars."

287 F. Supp. at 564.

The above cases all were concerned with rights incapable of monetary valuation, and jurisdiction was found to be lacking in each. See, also, in this regard: *Kurtz v. Moffitt*, 115 U.S. 487 (1885); *First National Bank of Youngstown v. Hughes*, 106 U.S. 523 (1882); *Carroll v. Somervell*, 116 F. 2d 918 (2nd Cir. 1941); *Barry v. Mercein*, 46 U.S. (5 How.) 103 (1847); and 1 Moore, Federal Practice, § 0.92[5] (2nd ed. 1964).

Although it is clear that the three-judge court below premised its jurisdiction upon 28 U.S.C. § 1331, and that such jurisdiction is absent, there is also a lack of original jurisdiction under the Civil Rights Act.

28 U.S.C. § 1343 provides that:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person; . . . (3) To redress the deprivation, *under color of any state law, statute, ordinary regulation, custom or usage*, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States: . . ." (Emphasis added.)

42 U.S.C. § 1983 provides:

> "Every person who, *under color of any statute, ordinance, regulation, custom, or usage of any State or Territory*, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in

equity, or other proper proceeding for redress." (Emphasis added.)

It is clear that jurisdiction under these statutes must be premised upon certain acts committed by a defendant *under the color of state law,* which acts deprived plaintiff of some right, privilege, or immunity secured by the Constitution or by an Act of Congress. Jurisdiction cannot exist in this case, however, because the acts of appellees were not done under the color of state law. The refusal to accept the petition was as a direct result of the dictates of a federal statute, the Communist Control Act of 1954, 50 U.S.C. §§ 841 and 842.

Nowhere in appellants' original or amended complaint is there an allegation that the alleged illegal acts of appellees were performed under the color of state law. In paragraph XVIII, of the complaint, after alleging that the petition met all the requirements of Minnesota law, appellants alleged that the refusal to accept the petition was based on an opinion by the Minnesota Attorney General. The memorandum of the Attorney General, however, was dictated by, and premised upon, the Communist Control Act. Appellee Head stated that Secretary of State Donovan should refuse to accept for filing the nominating petition *because of the provisions of 50 U.S.C. §§ 841 and 842.* The refusal was, therefore, not premised on any lack of compliance by the appellants with the Minnesota election laws nor was the refusal commanded by state law, but it was premised on the dictates of a federal statute. Appellants as much as admitted this point in paragraph XXIII of their complaint wherein they state:

"The illegal actions of the defendants as alleged herein are based upon the misconstruction and misapplication of the Communist Control Act of 1954 . . . ."

The distinction between acts done under color of state law and acts done under color of federal law was stated in *Norton v. McShane*, 332 F. 2d 855 (5th Cir. 1964). In that case, plaintiffs sued certain officials of the United States Department of Justice to recover damages for the deprivation of certain rights, growing out of their arrest during a civil rights disturbance. The court found no federal jurisdiction present under 42 U.S.C. § 1983.

> "The plaintiffs assert that they have alleged a cause of action under 42 U.S.C., § 1983, which is a federal civil rights statute imposing civil liability on any 'person, who, under color of any statute, ordinance, regulation, custom, or usage, *of any State or Territory*,' subjects anyone to the 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws.' Thus, the person must be acting under color of *state* law for the section to apply, whereas the defendants in the instant suits were acting under color of *federal* law. As Judge Hand stated in the Gregoire case, 'Section 43 [the precursor of § 1983] is so plainly limited to acts done under color of some state or territorial law or ordinance that no discussion can make it clearer than appears from its reading.' 177 F. 2d at 581."

332 F. 2d 855, 862. [Emphasis in original.]

Appellants in their briefs and arguments below placed much weight upon *Bomar v. Keyes*, 162 F. 2d 136 (2nd Cir. 1947), arguing that the case is authority for the proposition that the appellees, in the instant case, were acting under color of state law. In *Bomar*, plaintiff was a probationary teacher who sued her principal and other school officials to recover damages for deprivation of her rights. The facts showed she was discharged because of her absence from duty caused by her service on a federal jury.

The court stated jurisdiction was present under the Civil Rights Act.

> "That the plaintiff's discharge was 'under color' of a state statute scarcely needs discussion, and indeed follows from the very grounds given both by the Commissioner of Education and the judge in the state court. Both declared as their reason that, since under the New York Education Law, the plaintiff was only a 'probationary teacher,' her superiors were free to discharge her for any reason or no reason. From this it was thought to follow that, if they discharged her because she had served upon a federal jury, the discharge was lawful, regardless of the Civil Rights Act."

162 F. 2d 136, 139.

Thus, the deprivation of plaintiff's rights was plainly performed under color of state law.

Bomar does not support appellants' position because, in the instant case, the decision to reject the petition was required, not by any state statute or regulation, as there, but by a federal statute.

For the reasons stated above, there is no subject matter jurisdiction present, and the appeal should be dismissed.

II

The three-judge District Court was convened improperly pursuant to 28 U.S.C. §§ 2282 and 2284, as the relief requested did not require the restraining of the operation, enforcement or execution of an Act of Congress for repugnance to the Constitution of the United States.

28 U.S.C. § 2282 provides as follows:

> "An interlocutory or permanent injunction *restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States* shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." (Emphasis added.)

Section 2284 of Title 28 sets forth the procedure for convening the three-judge court, notice to certain parties, and other procedural requirements. We must start with the proposition that 28 U.S.C. § 2282, and its counterpart in regard to the enforcement, operation, or execution of any state statute, 28 U.S.C. § 2281, are to be given a strict construction to protect the appellate docket of the Supreme Court. *Darlington, Inc. v. Federal Housing Administration*, 134 F. Supp. 337 (E.D. S.C. 1955), *rev'd. on other grounds*, 352 U.S. 977 (1957); *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368 (1949).

With this rule of strict construction in mind, this Court has enunciated certain requirements that must be met in order for there to be a proper convening of a statutory three-judge court.

> "When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the Constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute."

Idlewild Bon Voyage Liquor Corporation v. Epstein, 370 U.S. 713, 715 (1962).

With respect to the requirement that the complaint at least formally allege a basis for equitable relief, it is the position of appellees that 28 U.S.C. § 2282 requires the equitable relief to be framed as a prohibitory injunction which itself *restrains* ". . . the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States. . . ." 28 U.S.C. § 2282.

Plaintiffs' prayer for relief contains no such request for a prohibitory injunction, but instead requests only a mandatory injunction requiring appellee Donovan to: 1) accept and file the petition for nomination; and 2) place upon the ballot for the November 5, 1968 general election the names of Mitchell and Zagarell as candidates of the Communist Party. The amended complaint likewise contains no request for an injunction which in any way requires restraining the enforcement, execution, or operation of any Act of Congress, specifically 50 U.S.C. §§ 841 and 842.

Illustrative of Congress' intention that § 2282 must pertain only to prohibitory injunctions that interdict the operation, execution or enforcement of a federal statute is *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). Mendoza-Martinez was ordered deported as an alien because he lost his citizen-

ship by remaining outside the United States in time of war or national emergency, for the purpose of avoiding military service. He sued for a declaratory judgment, asking that various sections of the Immigration and Nationality Act be declared unconstitutional, and that the orders of deportation be declared void. A one-judge District Court held Section 401(j) of the Nationality Act of 1940 to be unconstitutional. On appeal, one issue was whether a three-judge Court should have been convened to hear the case, pursuant to 28 U.S.C., § 2282. This Court was satisfied, however, that the case was properly heard by a one-judge District Court, because no injunctive relief was requested by plaintiff, and the regulatory scheme of the Nationality Act was not interdicted in any fashion. In so doing, the Court stated that § 2282 and its complement, § 2281, "were enacted to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme, either state or federal, by issuance of a broad injunctive order." 372 U.S. 144, 154.

The Court looked to the legislative history of § 2282 to determine its purpose:

> "Repeatedly emphasized during the congressional debates on §2282 were the heavy pecuniary costs of the unforeseen and debilitating interruptions in the administration of federal law which could be wrought by a single judge's order, and the great burdens entailed in coping with harassing actions brought one after another to challenge the operation of an entire regulatory scheme, wherever jurisdiction over government officials could be acquired, until a judge was ultimately found who would grant the desired injunction. 81 Cong. Rec. 479-481, 2142-2143 (1937)"

372 U.S. 144, 155.

The mere declaration of unconstitutionality, without any request for a prohibitory injunction, does not trigger the convening of a three-judge court.

> "The relief sought and the order entered affected an Act of Congress in a totally noncoercive fashion. There was no interdiction of the operation at large of the statute. It was declared unconstitutional, but without even an injunctive sanction against the application of the statute by the Government to Mendoza-Martinez. Pending review in the Court of Appeals and in this Court, the Government has been free to continue to apply the statute. That being the case, there is here no conflict with the purpose of Congress to provide for the convocation of a three-judge court whenever the operation of a statutory scheme may be immediately disrupted before a final judicial determination of the validity of the trial court's order can be obtained."

Id.

In the instant case, the District Court purposefully did not reach the merits of the case, and did not decide whether the Communist Control Act of 1954 was constitutional or unconstitutional. More important, there was no prayer for relief that would in any way interdict the operation of the federal statute. The prayer for relief demanded only a mandatory injunction that the Secretary of State accept the nominating petition and place appellants' names on the general election ballot. The actions of appellees in rejecting the petition were performed in reliance upon the federal Act, and the granting of the temporary injunction affected the Communist Control Act in a totally noncoercive fashion. There was no "applica-

tion for an interlocutory or permanent injunction to restrain the enforcement of an Act of Congress." *Pennsylvania Public Utility Commission v. Pennsylvania Railroad Company*, 382 U.S. 281, 282 (1965).

That § 2282 requires not only an application for a prohibitory injunction, but also a prohibitory injunction which directly interrupts the operation of a federal statute, can be seen from *International Ladies' Garment Workers' Union et al. v. Donnelly Garment Co. et al.*, 304 U.S. 243 (1938). That case involved an application for an injunction to restrain union members from committing certain acts alleged to be in furtherance of a conspiracy in violation of the Sherman and Clayton Acts. The case was heard and decided by a three-judge District Court, but this Court held the three-judge court was improperly convened, and remanded the cause. This Court stated that there was no application before the district court for an injunction which in any way restrained the enforcement of an Act of Congress.

> "The only application for an injunction was one to restrain the defendants from committing certain acts in pursuance of the alleged conspiracy in violation of the Anti-Trust Acts. The statute did not authorize a decision by three judges upon that application or authorize a direct appeal to this Court."

304 U.S. 243, 251.

Thus, the application was for a prohibitory injunction, but the injunction in no way had a direct, coercive influence upon the federal statutes involved.

A case very similar to the instant proceeding is *Fleming v. Nestor*, 363 U.S. 603 (1960). There, plaintiff challenged the constitutionality of § 202(n) of the Social Security Act, which

provided for the termination of old-age benefits payable to an alien deported pursuant to § 241(a) of the Immigration and Naturalization Act. The case was heard before a one-judge District Court, and an issue on appeal was whether a three-judge court should have been convened. This Court held that the one-judge court was proper.

> "Under the decisions of this court, this § 205(g) action could, and did, draw in question the constitutionality of § 202(n). . . . However, the action did no more. It did not seek affirmatively to interdict the operation of a statutory scheme. A judgment for appellee would not put the operation of a federal statute under the restraint of an equity decree; indeed, apart from its effect under the doctrine of stare decisis, it would have no other result than to require the payment of appellee's benefits. . . ."

363 U.S. 603, 607.

In the instant case, plaintiff did not seek affirmatively to interdict the federal statute. An injunction in favor of plaintiff, either permanent or in the temporary form in which it was granted, could not put the federal statute under the restraint of an equity decree. The temporary order only had the effect of requiring the names to be placed upon the ballot, analagous to the *Fleming* case, where the only result would have been to require the payment of old-age benefits.

It should be noted that once the election of November 5, 1968 transpired, appellants' amended complaint became decisive, but such did not ask for *any* form of injunctive relief. Appellants were then simply asking the court to reach the merits of the declaratory judgment phase of the lawsuit, by claiming there was yet an existing controversy. The action then became only a declaratory judgment action and any

jurisdiction that *might* have existed previously based on § 2282, was vitiated by the lack of any continued request for injunctive relief. A declaratory judgment action alone is insufficient to warrant a hearing by a three-judge court. *International Ladies' Garment Workers' Union v. Donnelly Garment Co. et al., supra*; *Pennsylvania Public Utility Commission v. Pennsylvania Railroad Co., supra.*

Thus, the three-judge District Court was improperly convened in the first instance, pursuant to 28 U.S.C., § 2282 and § 2284. If properly convened in the first instance, the jurisdiction of the three-judge court was vitiated by the lack of any request for injunctive relief subsequent to the general election; and, as a consequence, the appeal must be dismissed.

III

A direct appeal to this Court pursuant to 28 U.S.C. § 1253 is impermissible, as the order dismissing the complaint could and did refer only to the prayer for a declaratory judgment, the prayer for injunctive relief having been rendered moot by the general election.

Section 1253 of Title 28 U.S. Code provides as follows:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit, or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

The appeal in this case has been taken from the order of the three-judge Court which dismissed appellants' complaint as

moot on July 14, 1969, *Mitchell v. Donovan*, 300 F. Supp. 1145 (D. Minn. 1969).

Such an order is *not* appealable because: 1) the action was not one "required by any Act of Congress to be heard and determined by a district court of three judges," as discussed above, and 2) the order was not one which granted or denied an interlocutory or permanent injunction.

As previously mentioned, the injunctive relief requested in the complaint pertained only to the general election held Novmber 5, 1968. This relief was granted in the order of the three-judge court dated October 2, 1968, *Mitchell v. Donovan*, 290 F. Supp. 642 (D. Minn.), and defendant in all respects complied with that order, *Mitchell v. Donovan*, 300 F. Supp. 1145, 1146. After the general election, plaintiffs were allowed to amend their complaint by alleging that the Communist Party of Minnesota plans to participate in future elections, and that "on information and belief," Attorney General Douglas M. Head will render the same opinion in the future, namely, that the Communist Control Act of 1954 bars the Communist Party of Minnesota or any of their candidates from participating in any elections in the State of Minnesota. 300 F. Supp. 1145, 1146-1147.

The prayer for relief was not amended in any way, and therefore, there was no request for an interlocutory or permanent injunction pending before the court. The only remaining prayer for relief was that the Communist Control Act of 1954 be declared unconstitutional. The District Court explicitly stated in the first sentence of its opinion:

> "We concern ourselves here with the propriety of entertaining that portion of plaintiffs' complaint seeking declaratory relief . . . ."

300 F. Supp. 1145, 1146.

The Court then decided that the issues presented were moot and rendered its order dismissing the complaint. This appeal, therefore, is not from an order granting or denying an interlocutory or permanent injunction, as § 1253 requires; because the injunctive relief sought pertained only to the November 5th election. Once the election was held, the sole relief possibly remaining was the granting of a declaratory judgment. The order of dismissal, therefore, could not and did not pertain to the request for injunctive relief, but only to the request for a declaratory judgment. The order is, therefore, not appealable because it did not grant or deny an interlocutory or permanent injunction. 28 U.S.C. § 1253.

The cases cited by appellants to sustain the jurisdiction of this Court to review the judgment on direct appeal pursuant to 28 U.S.C. § 1253, are not applicable. In both *Clark v. Poor*, 274 U.S. 554 (1927), and *Florida Lime and Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960), plaintiffs requested injunctive relief in their complaints, the complaints were dismissed and the appeals taken from the orders of dismissal. In the instant case, the only prayer for relief presented to the District Court on July 14, 1969, was for a declaration that the Communist Control Act was unconstitutional. There was no dismissal of a request for injunctive relief, because the injunctive relief prayed for only pertained to the election of November 5, 1968, and that relief had already been granted.

For the above stated reasons, the Supreme Court lacks jurisdiction over the Appeal, and therefore the same must be dismissed.

IV

The three-judge District Court, if it possessed the requisite jurisdiction, properly dismissed the prayer for declaratory relief on the ground that the questions presented were moot and therefore did not present an actual justiciable controversy.

Assuming for the sake of argument that the three-judge District Court had subject matter jurisdiction and was convened for a proper purpose, it was justified in dismissing the prayer for declaratory relief on the ground that the questions presented were moot and therefore did not present an actual justiciable controversy.

The judgment from which the instant appeal arises denied declaratory relief to appellants, claimed to be justified by the constitutional repugnance of 50 U.S.C. §§ 841 and 842, and determined that:

> "There is no 'actual controversy' as is required by the Constitution, by a long line of Supreme Court decisions, and by the express wording of the Declaratory Judgment Act."

Mitchell v. Donovan, 300 F. Supp. 1145, 1150 (D. Minn. 1969).

All that the Court concerned itself with was "that portion of plaintiffs' complaint seeking declaratory relief. . . .", *Id.* at 1146. As is required by U.S. Const. art. 3, § 2, and the express language of the Declaratory Judgment Act, 28 U.S.C. § 2201, it became a precondition of granting relief that an actual controversy exist,

> "In a case of actual controversy within its jurisdiction, . . . any court of the United States, . . . may declare

> the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall be reviewable as such."

Declaratory Judgment Act, 28 U.S.C. § 2201.

"Actual controversy" has been defined variously, and it contemplates a real, as opposed to hypothetical, dispute between parties having adverse legal interests of sufficient immediacy and reality to warrant determination by the Courts. *Zwickler v. Koota*, 389 U.S. 241 (1967); *Evers v. Dwyer*, 358 U.S. 202 (1958). The constitutional standard for the basis of federal jurisdiction that there be an actual "case or controversy" is not in any way affected by having the Declaratory Judgment Act extant. *Maryland Casualty Co. v. Pacific Coal and Oil Co.*, 312 U.S. 270 (1941); *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227 (1937). In fact, as the court below recognized, the

> ". . . Constitutional hurdle demanding the existence of an actual case or controversy was in no sense abated by the Declaratory Judgment Act. In fact the course of a federal litigant seeking declaratory relief is in a sense the more exacting, for,
>
> '[t]he Declaratory Judgment Act was an authorization, not a command. It gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so.' Public Affairs Assoc., Inc. v. Rickover, 369 U.S. 111. . . . (1962)."

Mitchell v. Donovan, 300 F. Supp. 1145, 1147.

The key word in the phrase is "actual" (controversy). Below, the temporary injunction issued October 2, 1968 sufficed to give appellants all of the relief they possibly could

have achieved with respect to the November 1968 general election. Appellees complied fully with the Court's mandate. By a petition filed on October 10, 1968, to amend their complaint, which was granted on July 14, 1969, appellants alleged that they intended to participate in future local, state and national elections to be held in Minnesota subsequent to November 5, 1968, and that on "information and belief" the appellee Attorney General will continue to hold that 50 U.S.C. §§ 841 and 842 bars appellants from participating in such elections. The claimed intention to run candidates under the designation "Communist Party" in Minnesota elections on unspecified future dates, and the "information and belief" as to what appellee Head will advise Minnesota election officials to do were sufficient, in appellants' opinion, to create the required actual controversy between appellees and them. The court below quite properly found that the controversy was at best hypothetical. 300 F. Supp. 1145, 1150.

The official Opinions of the Attorney General of Minnesota do not have the force and effect of law (except for opinions issued on school matters to the State Commissioner of Education, which are decisive on the issues raised until otherwise determined by a court of competent jurisdiction). Minn. Stat. 1967, Secs. 8.02 and 8.07. Minnesota has no statute remotely comparable to the Communist Control Act, nor do its election laws in any way attempt to dictate the policies of the parties which seek to run candidates on the state ballot. The method under which a minority party is placed on the state ballot by petition is not arduous, Minn. Stat. 1967, Secs. 202.09 and 202.10, and there can be no valid claim that the state's election laws make it "virtually impossible for a new political party, . . . or an old party . . . to be placed on the state ballots . . .", *Williams et al. v. Rhodes et al.*, —— U.S. ——,

89 S. Ct. 5 (1968), or, put another way, that the state's election laws with respect to placing appellants on future ballots violate the Due Process and Equal Protection clauses of the 14th Amendment. *Moore v. Ogilvie*, —— U.S. ——, 89 S. Ct. 1493 (1969). In short, there is nothing to indicate a firmly imbedded state policy by statute or otherwise which would lead to the probable certainty that this "controversy" will ever be joined again. 300 F. Supp. 1145, 1149.

A number of other factors point out the gossamer nature of the "controversy". Initially, it must be noted that the communication between appellees Head and Donovan on September 9, 1968, which led to Donovan's refusal to accept appellants' nominating petition was not a formal Opinion of the Attorney General as such is contemplated by Minn. Stat. 1967, Sec. 8.02. It was nothing more than a memorandum issued with the knowledge that this litigation might ensue, and issued without the benefit of any federal court or United States Supreme Court decisions as to the constitutionality of 50 U.S.C. §§ 841 and 842, or that statute's applicability to state elections. Now, as a result of the litigation, the position of the United States Attorney has been enunciated, and there have been two federal court opinions which shed light on both the applicability and constitutionality of the federal statute. Such might lead the present or some future Attorney General to alter his position.

Secondly, even if it were to be presumed or determined that appellee Head's September 9th memorandum to appellee Donovan rises to the status of a section 8.02 Opinion, nothing in fact or in state law would prevent the withdrawal or overruling of it either with or without a subsequent formal Opinion. In view of the fact that the appellees complied in all respects with the October 2, 1968 mandate of the three-

judge District Court to accept appellants' nominating petition and to place the names of appellants Mitchell and Zagarell on the ballot, while at the same time making a public announcement that the temporary injunction would not be contested by appellate proceedings, one is not bolstered in an "information or belief" that appellee Head's determinations will remain constant.

Further, it appears that appellee Donovan was not legally bound to adhere to the advice contained in the September 9th memorandum, although, of course, he did choose to do so; nor does it appear that appellee Head considered that he was closing all of appellee Donovan's options. The final paragraph of the memorandum reads:

> "In view of the above federal statutes, we are of the opinion that you should refuse to accept for filing the nominating petition in question. However, any doubts relative to this matter can only be finally resolved by the courts pursuant to appropriate legal proceedings."

The last-quoted sentence is unnecessary if one takes the position that Head's "opinion" on the subject is totally final and binding. By including the sentence, the option for Donovan to act upon any doubts he might have as to the effect on his authority posed by 50 U.S.C. §§ 841 and 842, and accept the nominating petition is left open. In 1968, Secretary Donovan chose to follow the Attorney General's advice but he joined with Head in choosing not to appeal the October 2nd mandate. Should an opinion be requested at some future date, which is not at all certain, and should the same advice be forthcoming from the Attorney General, the Secretary might just as well as not accept for filing a Communist Party nominating petition.

Tacitly present in appellants' complaint, as amended, is the assumption that Douglas M. Head and Joseph L. Donovan will occupy their present official positions at the time of all elections in the foreseeable future. The assumption is, of course, fallacious; and made particularly so by the facts that Secretary Donovan has announced publicly that he will not stand for reelection and that Attorney General Head is presently a candidate for a different elective office. The court below did not and could not attempt to determine what the positions of the unknown successors to Donovan and Head will be on any issue, and least of all on the emotionally volatile effect of 50 U.S.C. §§ 841 and 842 on Minnesota substantive and procedural election laws.

Appellants' amended complaint alleges that the Communist Party will enter candidates under its banner in future Minnesota national, state and local elections. On November 3, 1969, there were held numerous contests throughout the state to elect persons to serve as mayors, councilmen, and members of various other representative bodies. At no such election did the Communist Party attempt to field a candidate. It is probably fair to assume that shortly prior to the presidential election to be held in November, 1972 will be the first opportunity for the "controversy" to become "actual" in Minnesota. As such, the court was fully justified in July, 1969 in holding that such an embryonic "controversy", which probably would not ripen until 1972 if at all, was not such as to require a determination. *Fair v. Dekle*, 367 F. 2d 377 (5th Cir. 1966), *cert. denied* 386 U.S. 996 (1967)

Of course the 1968 election was history at the time of the court's judgment in July, 1969. Appellants had received the injunctive relief they requested and an attempt to make the October 2nd temporary injunction permanent became moot by

virtue of the fact that appellees complied with the temporary injunction in all respects. This mootness, coupled with the factors listed above, deprived the court below of an actual case or controversy upon which to grant declaratory relief. U.S. Const. Art. 3, § 2; 28 U.S.C. § 2201.

For the reasons stated the judgment of the three-judge District Court, dismissing the within action on the grounds of mootness and lack of an actual controversy, must be affirmed.

V

As the three-judge District Court did not pass upon the claimed constitutional repugnance of 50 U.S.C. §§ 841 and 842, for this Court to do so would require an impermissible advisory opinion.

Appellants have raised a number of constitutional challenges to 50 U.S.C. §§ 841 and 842, but at this time none are ripe for a decision, as the three-judge District Court specifically refused to pass upon them, and because no actual controversy exists between appellants and appellees. Federal Courts established pursuant to U.S. Const. art. 3, are not permitted to render advisory opinions on constitutional issues. For there to be adjudications of constitutional issues there must be concrete legal problems presented in actual cases to be decided, not mere abstractions. This requirement, is of course, as valid a prerequisite for the entry of a declaratory judgment as it is in any other field. U.S. Const. art. 3, § 2; 28 U.S.C. § 2201; *Golden v. Zwickler*, 394 U.S. 103 (1969); *United Public Workers of America, C.I.O. v. Mitchell*, 330 U.S. 75 (1947).

The duty of this Court is to decide actual controversies by judgment, which are capable of being carried into immediate

effect, and not to give opinions upon moot quesions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in the case before it. This duty is constitutional in scope and renders this Court unable to deliver advisory opinions. U.S. Const. art. 3, § 2; *Bell v. Maryland*, 378 U.S. 226 (1964); *United States v. Fruehauf*, 365 U.S. 146 (1961); *Oil, Chemical and Atomic Workers International Union, A.F.L.-C.I.O. v. Missouri*, 361 U.S. 363 (1960).

It is apparent that it is most probable that the "controversy" concerning the placement of Communist Party candidates on the Minnesota ballot will never again arise, and certainly will not arise in the definitely foreseeable future. The named appellees will probably not be in their respective offices when Communist Party candidates' petitions are next presented; and, if they are, they will undoubtedly recall the temporary injunction issued in October of 1968, and consider the adamant refusal to accept the same to be futile, irrespective of Solicitor Kyle's remarks. The Party may not advance candidates for office in Minnesota elections ever again despite Mrs. Smith's affidavit. (The Party ran no candidates in Minnesota at all from 1949 to 1968; and the results with respect to the 1968 general election were so abysmally pathetic that it is possible the Party will choose to exert its future political efforts before a more receptive electorate.) Also, there is the distinct possibility that this Court will have occasion, in a more appropriate context, to rule as to the constitutional validity of 50 U.S.C. §§ 841 and 842, before appellants again attempt to get on the Minnesota ballot. Should such a determination be made, no controversy with respect to the state election process would be possible between the present parties. In this context then, it would be inappropriate for this Court to issue an advisory opinion—as such is all a decision on the

constitutional validity of §§ 841 and 842 could be with respect to the parties herein—predicated upon issues which are now moot and which never again may arise. *Baker v. Carr*, 269 U.S. 186 (1962); *Oliver v. United States*, 335 F. 2d 724 (D.C. Cir. 1964), *cert. denied, Crump v. United States*, 379 U.S. 980 (1965); *Amalgamated Ass'n. of St. Elec. Ry. & Motor Coach Emp. of America, Division 998 v. Wisconsin Employment Relations Bd.*, 340 U.S. 416 (1951); see, also, *Taylor v. United States*, 410 F. 2d 392 (5th Cir. 1969); *Koll v. Wayzata State Bank*, 397 F. 2d 124 (8th Cir. 1968); *Wolff v. Selective Service Board*, 372 F. 2d 817 (2nd Cir. 1967); *Wirtz v. Local Unions 410, et al.*, 366 F. 2d 438 (2nd Cir. 1966); and *Shaffer v. Bridges*, 295 F. Supp. 869 (S.D. Miss. 1969); and, see, *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953).

When the District Court did not pass upon the asserted claims of unconstitutionality of the Communist Control Act of 1954, 50 U.S.C. § 841 and § 842, any determination of those claims on appeal would constitute an impermissible advisory opinion.

It is clear from both three-judge District Court opinions that the seriousness of appellants' asserted claims of unconstitutionality was recognized. While the gravity of those claims was acknowledged, the Court in its first opinion determined that there was insufficient time to deal with the issues on the merits, and merely balanced the equities in deciding that a temporary mandatory injunction should issue. In its later opinion, the Court again did not reach the constitutional issues, because of its threshold decision that a justiciable case of controversy was no longer present.

Thus, the District Court has not decided the merits of appellants' constitutional claims, and has in fact not even considered those claims beyond the point of noting their

gravity. Although the briefs below dealt with the substantive issues, almost all of the time spent at all oral arguments was given over to the jurisdictional issues and appellees' claim of a lack of a justiciable case or controversy. Thus, the substantive issues were neither decided nor fully argued below. For this Court now to decide these issues on appeal would require the rendition of an unconstitutional advisory opinion. What was enunciated concerning advisory opinions in *United States v. Fruehauf*, 365 U.S. 146 (1961) is likewise applicable here:

> "Such opinions, such advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of advisory argument exploring every aspect of a multi-faced situation embracing conflicting and demanding interests, we have consistently refused to give."

365 U.S. 146, 157. [Citations omitted.]

That such a disposition would constitute an advisory opinion can be seen from *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947). That was an action against members of the civil service commission to enjoin them from enforcing the Hatch Act. Plaintiffs, however, did not allege that they had violated the Act, or that they were threatened with any disciplinary action, but only that they desired to engage in political campaigns, and could not do so for fear of dismissal. The District Court granted summary judgment *for* the defendants, and on appeal the Court held there was no justiciable case or controversy present.

> "A hypothetical threat is not enough. We can only speculate as to the kinds of political activity the appellants desire to engage in or as to the contents of their proposed public statement, or the circumstances of their publication. It would not accord with judicial responsibility to adjudge in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interferences upon the other."

330 U.S. 75, 90.

Another example of this judicial attitude can be gleaned from *Corsican Productions v. Pitchess*, 338 F. 2d 441 (9th Cir. 1964), an action under the Civil Rights Act arising out of threats by the authorities to prosecute exhibitors of certain obscene films. The complaint was dismissed for failure to state a claim. The Circuit Court reversed, holding the complaint to state a cause of action, but further holding that they could not render an advisory opinion.

> "It would be inappropriate to attempt finally to determine whether appellants would be entitled to relief upon a supposed state of facts encompassed within the broad boundaries of their pleading. To do so . . . would involve 'elucidating legal responsibilities as to facts which may never be'. Shull v. Pilot Life Ins. Co., 313 F. 2d 445, 447 (5th Cir. 1963). An advisory opinion as to a necessarily hypothetical case is particularly undesirable where, as here, principles are in a formative and uncertain state."

338 F. 2d 441, 443.

As no relief, other than that already obtained by appellants, could be forthcoming if this Court were to determine the constitutional issues presented, and as no actual controversy exists between the parties, the judgment of the three-judge District Court must be affirmed.

CONCLUSION

For the reasons set forth, the appellees respectfully request that their "Motion to Dismiss the Appeal or, In the Alternative, to Affirm the Judgment Entered Below" be granted.

Respectfully submitted,

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